For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELODY S. SWENSON,	*	
Plaintiff-Appellee,	*	No. 98-16799
v.	*	D.C. No. CV-97-20398-EAI
JOHN E. POTTER, Postmaster General of the United States of America,[*]	*	**OPINION**
Defendant-Appellant.	*	

Appeal from the United States District Court
for the Northern District of California
Edward A. Infante, Magistrate Judge, Presiding

Argued and Submitted February 16, 2000
San Francisco, California

Filed November 30, 2001

Before: **KOZINSKI, FERNANDEZ** and **W. FLETCHER**, Circuit Judges.

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[*] John E. Potter is substituted for his predecessor, William J. Henderson. See Fed. R. App. P. 43(c)(2).

KOZINSKI, Circuit Judge.

When an employee accuses a fellow employee of sexual harassment, the employer must reconcile competing rights: the accuser's right to a harassment-free workplace and the accused's right not to be disciplined without fair procedures and sufficient proof of wrongdoing. The employer, too, has a legitimate interest in resolving the dispute with the least possible disruption to its operations and without risking liability if a jury later disagrees with its conclusions. We consider the employer's options and responsibilities in such circumstances.

I

While the facts were disputed at trial, we state them here consistent with the jury's verdict. Melody Swenson was working as a mail sorter for the U.S. Postal Service when she met Philip Feiner in August 1993. Feiner worked in the same general area of the San Francisco Processing and Distribution Center. Swenson testified that Feiner told her she was beautiful and sexy, that he dreamed about her at night, and that he watched her "ass moving." When Swenson clocked in to work, Feiner would be at the time clock waiting to greet her. According to Swenson, who is deaf, he asked her to teach him the sign for "sex" and told her, "I want to kiss you and go to a private room"; Swenson replied, "No, I'm married."

These incidents and comments made Swenson uncomfortable enough to complain to co-workers about Feiner's conduct. Nevertheless, she did not tell Feiner that his attention was unwelcome, nor did she inform her supervisors that Feiner was bothering her. Matters came to a boil on January 24, 1994, the day of the "grabbing incident." On that day, Feiner approached Swenson and said, "I want to kiss you," "You're my favorite," and grabbed her gloved hand. She jerked her hand away and screamed "Stop it," and he walked off. Swenson said she perceived Feiner's conduct to be the beginning of a rape.

Swenson complained to a co-worker, Li Lee. Lee told Swenson's supervisor, Ruben Domingo, that Feiner had grabbed Swenson's hand and tried to kiss it, but she did not tell Domingo that Swenson had complained of Feiner's conduct in the past. Domingo, who had never before received a complaint about Feiner, immediately discussed the grabbing incident with him. Domingo told Feiner he had committed sexual harassment and warned him to stay away from Swenson. Feiner disputed Swenson's characterization of the incident, but agreed to stay away. Feiner did in fact approach Swenson one last time to apologize. After insisting that she shake his hand, he walked away.[1]

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[1] Swenson testified that Feiner said: "I'm sorry. I won't bother you again." He also asked her why she had told everyone about him, saying that "[i]t made

(continued...)

Three days later, Swenson herself reported the grabbing incident to the human resources coordinator, Randy Rollman. Rollman passed the complaint on to his own supervisor, Barbara Faciane, who immediately opened an investigation. Faciane began by cautioning Feiner to stay away from Swenson and reiterating that sexual harassment is unacceptable. Faciane then interviewed Swenson, Lee and Domingo, and asked them all for written statements. Swenson provided one, then revised it a week later with the assistance of an interpreter provided by the Postal Service.[2] In her statement, Swenson disclosed—for the first time to a supervisor—the comments Feiner had made over the preceding months, and she repeated her account of the grabbing incident. Feiner, for his part, claimed he had merely tried to shake Swenson's hand and, because Swenson had been wearing a dirty glove, had "held her wrist very lightly" to remove it. Feiner also denied making any sexual comments to Swenson on other occasions.

On the same day as her initial discussion with Swenson, Faciane temporarily moved her to a new location in the Processing Center in order to minimize contact

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(...continued)
[him] embarrassed."

[2] The agency attempted to obtain an interpreter sooner, but was unable to find an earlier time when both Swenson and an interpreter were available. It provided Swenson with the services of a sign language interpreter as soon as she and the interpreter found a mutually convenient time to meet.

between the two employees during the investigation. Faciane asked Swenson what she wanted done to resolve the complaint, and Swenson requested a meeting with Feiner, so that she could personally tell him to leave her alone. But the meeting never took place. The Postal Service had scheduled it for February 10, and had arranged for Swenson to meet with an interpreter, a management representative, a union representative and Feiner. However, Swenson stopped working after February 4, the day after she gave her revised statement to Faciane. Swenson said the grabbing incident gave her nightmares, and she was afraid to work in the same building as Feiner.

Jim Larson, manager of the entire Processing Center, met with Swenson and her union representative to try to resolve her complaint. Larson's effort proved unsuccessful and the Postal Service turned over responsibility for the investigation to Charles Bonds, a Senior Labor Relations Specialist. Over the next two months or so, Bonds interviewed Swenson three times. He investigated the grabbing incident and her other complaints by interviewing or obtaining written statements from her co-workers and supervisors. He also reviewed all transcripts and documents associated with the case. Bonds concluded his investigation in April or May 1994, finding insufficient evidence to support formal discipline against Feiner for sexual harassment.

In April, Bonds met with Swenson and her union representative to arrange for her return to work. Swenson agreed to return to work if assigned to the location where Faciane had moved her on January 28, away from Feiner's work area. Even though employees ordinarily must bid for new positions, the Postal Service reassigned her to that location and offered her a customized schedule to minimize contact with Feiner. Swenson returned to work on or about April 7, 1994, and remained in her new work area until she left for good on June 16, 1995. Her only contact with Feiner over that fourteen-month period consisted of some sixteen sightings in the Processing Center.

The jury returned a special verdict finding that the Postal Service knew, or should have known, of Feiner's sexually harassing conduct as of January 24, 1994, the date Swenson's co-worker Li Lee reported the grabbing incident to Domingo, and that the Postal Service failed to take prompt and appropriate action to end the harassment once it became aware of it.[3] It awarded Swenson $125,000 in damages, but the district court reduced the award to $85,000. We review de novo the district court's denial of the Postal Service's motion for judgment as a matter of law, see Marcy v. Delta Airlines, 166 F.3d 1279, 1282 (9th Cir. 1999), and the jury's verdict

[3] The jury also found that Swenson was not constructively discharged from her employment. Swenson does not appeal this finding.

for substantial evidence, see Ortiz v. Bank of Am. Nat'l Trust & Sav. Ass'n, 852 F.2d 383, 388 (9th Cir. 1988).

II

The Postal Service argues that Swenson's claim is barred because she failed to exhaust administrative remedies. A discrimination complaint is timely only if the complainant has contacted an EEO counselor "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1). The Postal Service claims that Swenson's complaint was untimely because she did not speak to an EEO counselor until fifty-three days after the grabbing incident.

But the grabbing incident is not "the matter alleged to be discriminatory." Swenson claims that the Postal Service violated Title VII by failing to take appropriate corrective action in response to her allegation of co-worker harassment. The matter alleged to be discriminatory is the adequacy of the employer's response, not the co-worker's underlying behavior. See pp. 8-10 infra. Swenson's statutory forty-five day period thus did not start to run until the employer took final action on her complaint. Because Swenson contacted an EEO counselor before the Postal Service had even concluded its investigation, she acted well before the forty-five day window had closed, and her discrimination complaint was timely.

III

Under Title VII, an employer may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Sexual harassment is a form of sex discrimination. By tolerating sexual harassment against its employees, the employer is deemed to have adversely changed the terms of their employment in violation of Title VII. See Brooks v. City of San Mateo, 229 F.3d 917, 923 (9th Cir. 2000).[4]

To prove a "hostile work environment"[5] claim, plaintiff must demonstrate

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[4] While an employer may also violate Title VII by sanctioning harassment beforehand, Brooks, 229 F.3d at 924, Swenson does not allege that the Postal Service created a work atmosphere that encouraged or ignored employees' sexually harassing behavior.

[5] We use the term "hostile work environment" only as a threshold indicator of the type of harassment alleged (i.e., as opposed to quid pro quo harassment). As the Supreme Court instructed in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), "[t]he terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility. . . . The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain [that the hostile work environment claim] must be severe or pervasive." Id. at 751-52 (emphasis added). The label we attach to a particular claim, however, has no relevance to an employer's liability for an employee's discriminatory conduct. See id. at 752; see also Eugene Scalia, The Strange Career of Quid Pro Quo Sexual Harassment, 21 Harv. J.L. & Pub. Pol'y 307, 322-23 (1998).

conduct "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (alteration and internal quotation marks omitted); see also Clark County Sch. Dist. v. Breeden, 121 S. Ct. 1508, 1510 (2001). Where harassment by a co-worker is alleged, the employer can be held liable only where "its own negligence is a cause of the harassment." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998). Title VII liability is direct, not derivative: An employer is responsible for its own actions or omissions, not for the co-worker's harassing conduct.

If the employer fails to take corrective action after learning of an employee's sexually harassing conduct, or takes inadequate action that emboldens the harasser to continue his misconduct, the employer can be deemed to have "adopt[ed] the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy." Faragher v. City of Boca Raton, 524 U.S. 775, 789 (1998). On the other hand, an employer cannot be held liable for misconduct of which it is unaware. See Brooks, 229 F.3d at 924; see also Hostetler v. Quality Dining, Inc., 218 F.3d 798, 811 (7th Cir. 2000) ("Negligence of this nature exposes the employer not to liability for what occurred before the employer was put on notice of the harassment, but for the harm that the employer inflicted on the

plaintiff as a result of its inappropriate response."). The employer's liability, if any, runs only from the time it "knew or should have known about the conduct and failed to stop it." Ellerth, 524 U.S. at 759; see also Brooks, 229 F.3d at 924.

The jury found that the Postal Service first had notice of Feiner's conduct on January 24, the date Domingo learned of the grabbing incident. Until then, Swenson had never complained to management about Feiner's behavior, and the Postal Service cannot be held liable for its actions (or inactions) prior to that date. See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 673 (10th Cir. 1998).[6]

Notice of the sexually harassing conduct triggers an employer's duty to take prompt corrective action that is "reasonably calculated to end the harassment." Nichols v. Azteca Rest. Enters, Inc., 256 F.3d 864 (9th Cir. 2001); Fuller v. City of Oakland, 47 F.3d 1522, 1528 (9th Cir. 1995) (internal quotation marks omitted); Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991). This obligation actually has two parts. The first consists of the temporary steps the employer takes to deal with the situation while it determines whether the complaint is justified. The second

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[6] Plaintiff's counsel argued below that by taking inadequate remedial action, the employer ratifies (and becomes responsible for) past misconduct. We reject this contention. Ellerth makes it quite clear that the employer is responsible only for acts of misconduct committed after it has been put on notice. Ellerth, 524 U.S. at 759; see also Brooks, 229 F.3d at 924; Hostetler, 218 F.3d at 811; Adler, 144 F.3d at 673.

consists of the permanent remedial steps the employer takes once it has completed its investigation. Fuller, 47 F.3d at 1528; Ellison, 924 F.2d at 882.

A. We first consider the Postal Service's immediate response to Swenson's complaint. Upon hearing Swenson's allegations, supervisors twice warned Feiner that his conduct was sexual harassment and ordered him to keep away from Swenson.[7] The Postal Service also separated the two employees pending the outcome of an investigation by moving Swenson to a different location within the same facility. Separating Swenson and Feiner did not eliminate all contact between them, but the Postal Service was not required to provide Swenson a Feiner-free workplace merely because she complained about him. The degree of separation imposed, if any, must be a function of the severity of the alleged harassment and the evidence provided to the employer in support of the complaint. The more egregious the conduct alleged, and the more substantial the proof supporting the allegation, the harder the employer must try to minimize further contact between the two employees pending the outcome of the investigation.[8]

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[7] At Swenson's request, the Postal Service also arranged a meeting between her and Feiner so she could tell him personally that she wanted to be left alone.

[8] The employer is not required to separate the complainant and the accused employee pending the outcome of the investigation. Depending on the circumstances, which can include the employer's legitimate interest in avoiding

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The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified. An investigation is a key step in the employer's response, see Swentek v. USAIR, Inc., 830 F.2d 552, 558 (4th Cir. 1987) (employer obliged to investigate complaint and to present a reasonable basis for its subsequent action), and can itself be a powerful factor in deterring future harassment. By opening a sexual harassment investigation, the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace. An investigation is a warning, not by words but by action. We have held, however, that the "fact of investigation alone" is not enough, Fuller, 47 F.3d at 1529. An investigation that is rigged to reach a pre-determined conclusion or otherwise conducted in bad faith will not satisfy the employer's remedial obligation. See id.

The Postal Service here commenced an investigation on January 27, just

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[8](...continued)
disruption to its business, the employer may reasonably decide that the employees must continue working together while awaiting the outcome of the investigation. At the very least, however, the employer must try to eliminate contact between the two employees that is not strictly business-related. If it reasonably concludes that the two employees must continue to have regular business contact during the course of the investigation, the employer must take reasonable steps to expedite the investigation.

three days after management learned of the grabbing incident and on the same day Swenson herself complained. Faciane asked Swenson for a written statement the day after she complained to Rollman and, at Swenson's request, scheduled a face-to-face meeting with Feiner to try to resolve her complaint. Faciane also discussed Swenson's complaint with Feiner, as well as with Domingo and Swenson's co-worker Lee. When Charles Bonds took over the investigation, he continued to develop the record to assess Swenson's complaint. He obtained a written statement from Christopher Rom, another of Swenson's co-workers. He interviewed Feiner once and Swenson three times, each time with the assistance of a sign language interpreter.[9] Management officials up to and including the plant manager met with

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[9] At the initial interview on March 9, Swenson was represented by her union president. She said she did not want to transfer to a different facility and agreed to a customized work schedule as an interim solution. But she failed to report back to work. At the second interview, on March 16, a union steward represented Swenson at her request. He suggested that she "couldn't even come to the area where . . . the ugly memory has happened," and asked if the Postal Service could make an "accommodation" by transferring her to a different facility altogether. See n. 10 infra.

The dissent argues that Bonds was remiss in interviewing only Swenson and Feiner, not their "co-workers to see if any corroborating evidence existed." Dissent at 21; see also id. at 22-25, 33-34. But as the dissent acknowledges, Dissent at 22, Bonds was in charge of the investigation when Rom was asked to give a written statement. Lee had also given a written statement to Faciane. Moreover, none of Swenson's co-workers had witnessed any of the alleged acts of harassment, nor did Swenson claim they had. Cf. Hathaway v. Runyon, 132 F.3d 1214, 1218-19, 1224

(continued...)

Swenson and her representatives throughout the investigation, both to determine what had happened and to try to find a way to make her comfortable in the workplace. Swenson was able to present her complaint, articulate her concerns and express her view of preferred outcomes.

Bonds concluded the investigation in April or May, after about three to four months. While this may be somewhat longer than expected, the delay is explained by the fact that Swenson was not at work for most of that time, and interviews with her had to be scheduled when a sign language interpreter was available. All things considered, the Postal Service's interim response to Swenson's complaint was prompt and entirely appropriate.

B. We turn now to the permanent steps the Postal Service took in response to Swenson's complaint. While the Postal Service concluded that it could not sustain a charge of sexual harassment against Feiner, it nonetheless took permanent steps to separate Feiner and Swenson in the workplace. Without having to participate in the normal competition for a job change, Swenson was given a permanent job assignment that kept her from daily contact with Feiner. The Postal

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[9](...continued)
(8th Cir. 1997) (holding that when an employee presented an eyewitness's written statement describing a co-worker slapping her buttocks, the employer was remiss in failing to ask for the statement or interview the witness).

Service also offered Swenson a customized work schedule, which would have kept her from overlapping with Feiner's schedule. She chose, however, to return to her regular hours. Management representatives also discussed with Swenson various possibilities for job assignments to other Postal Service locations, but none of these turned out to be feasible, either because no openings were available or because Swenson refused to go there.[10]

We have held that an employer does not satisfy its remedial obligation by transferring the victim to "a less desirable location." Ellison, 924 F.2d at 882 (employer gave the victim a Hobson's choice of either working with her harasser or transferring to a less desirable location). Such a transfer adversely affects the terms and conditions of the victim's employment, and may itself be the basis for employer liability. See Hostetler, 218 F.3d at 811. But not every transfer adversely affects the victim's employment. If it decides to separate the two employees in the workplace, the employer may properly consider the relative ease of moving them and their respective importance to its business operations. The employer has wide

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[10] The Postal Service discussed with Swenson possible transfers to facilities in the Sacramento and Oakland Districts, as well as to other postal centers in the San Francisco District. The Sacramento District, however, was in the process of downsizing its workforce, so a transfer there was not possible, and Swenson ultimately decided to remain in San Francisco. She expressed concerns about losing her seniority and its benefits, as well as a reluctance to increase her commute or to leave her friends at the San Francisco Processing Center.

discretion in choosing how to minimize contact between the two employees, so long as the accuser is not moved to an objectively less desirable position.

Whether the position to which the employee is moved is less desirable is determined by objective factors that include, but are not limited to, the terms of employment. Thus, moving the accuser to a position with the same pay and responsibilities, but with a longer commute or an inconvenient work schedule, would be an inappropriate response. See id.; EEOC Compl. Man. (CCH) § 615.4(a)(9)(iii) (2000) (an employer's action is appropriate where it "fully remedie[s] the conduct without adversely affecting the terms or conditions of the charging party's employment in some manner (for example, by requiring the charging party to work less desirable hours or in a less desirable location)"). There is no evidence that Swenson's new position was objectively less desirable than the one she occupied at the time she complained about Feiner. The decision to move her, therefore, cannot support the jury's finding that the Postal Service failed to take appropriate corrective action after learning of her complaint.

While Swenson expressed discomfort with working in the same 435,000 square foot facility as Feiner, she saw him only about once a month and then usually from a distance. Except for a clumsy attempt at an apology, see n. 1 supra, and a vigorous "good morning" the following day, their contacts involved no

speech or physical contact.[11] Even if we assume there were sixteen such contacts over a fourteen-month period (and Swenson, in fact, complained to the employer of only a few of these incidents), and even if we allow for the fact that Swenson may have been particularly sensitive to contact with Feiner following his misconduct, none of their encounters, either alone or collectively, amount to sexual harassment.

Fuller v. City of Oakland, 47 F.3d 1522, is directly on point. In Fuller, we held that sexual harassment had stopped as a matter of law, even though Romero, the harasser, continued to be plaintiff's supervisor, and plaintiff presented evidence that Romero had engaged in a variety of actions that arguably constituted petty harassment, such as delaying approval of her work requests and singling her out for unfavorable treatment. Fuller, 47 F.3d at 1526, 1528. "Fuller reported feeling ostracized and afraid for her safety, because visible isolation on the beat endangers an officer's safety. Fuller developed a severe stress disorder and went on disability leave. One of Fuller's examining psychiatrists wrote a letter concluding that Fuller

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[11] At trial, Swenson described their occasional contacts:

> Well, if I was sitting on the . . . aisleway, I'd see [Feiner] walk by. And while I was working, I'd see him looking at me as he walked by, so I would see him. And near the machine, . . . if I was working there, I would see him talking with someone else and looking at me when I was in this area.

should not be returned to duty under Romero." Id. at 1526. We assumed that all these allegations were true, and held nevertheless that "[n]one of the incidents of contact appear to have been more than routine . . . . Even in light of what went before, a reasonable woman would not find the incidents Fuller details sufficiently severe and pervasive to alter her working environment." Id. at 1528.

Feiner was not Swenson's supervisor, and he had no business contact with her after the investigation began; although Swenson was uncomfortable with his presence, their contacts were far less extensive than Fuller's contacts with Romero. Moreover, Romero's misconduct was much more egregious than Feiner's to begin with. See id. at 1525-26.[12] The district court in our case correctly observed that Swenson's sixteen encounters with Feiner did not amount to a hostile work environment.[13] What this means is that the harassment stopped entirely as of the time Swenson and Feiner were separated, which was within three days of the time the jury found the employer was put on notice. Moreover, the harassment here, unlike that in Fuller, stopped as a result of the employer's intervention, not by the

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[12] Feiner's misconduct was also less serious than that in Star v. West, 237 F.3d 1036 (9th Cir. 2001), where the harasser "grabbed or put his arms around" Star, and touched either her breasts or her shoulders and hips. Id. at 1037.

[13] "If the jury did find there was sexual harassment because he stared at her 13 times [sic] in a year and a half, I would find, as a matter of law, that that was not sexual harassment."

harasser's voluntary and independent decision. See id. at 1529.

According to Ellerth, the employer cannot be held liable unless it reacts negligently to the harassment complaint. 524 U.S. at 759. Conversely, the employer will insulate itself from Title VII liability if it acts reasonably. Obviously, the employer can act reasonably, yet reach a mistaken conclusion as to whether the accused employee actually committed harassment. See Harris v. L & L Wings, Inc., 132 F.3d 978, 984 (4th Cir. 1997) ("[A] good faith investigation of alleged harassment may satisfy the 'prompt and adequate' response standard, even if the investigation turns up no evidence of harassment . . . [and] a jury later concludes that in fact harassment occurred." (citations omitted)).

After conducting an investigation, the Postal Service here concluded that it could not support a case of sexual harassment against Feiner. That, of course, is quite different from saying that the harassment didn't happen.[14] In deciding

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[14] Swenson's counsel made much of the fact that the Postal Service believed Feiner rather than Swenson. But the employer's abstract beliefs are of no consequence in determining Title VII liability. What matters are the employer's actions in light of the available evidence. In his testimony, Bonds explains that his purpose in conducting the investigation was not to decide who was telling the truth as such, but to determine whether the agency had sufficient evidence to support disciplinary action against Feiner:

> Q. Did you believe Phil Feiner more than you believed Melody Swenson on [the] issue [of whether Feiner asked Swenson to sign the word "sex"]?

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whether to punish Feiner, the Postal Service could properly take into account that Feiner was covered by a collective bargaining agreement, and so had the right to grieve any discipline imposed on him. Having concluded that it had insufficient evidence to sustain a charge of harassment, the Postal Service had an entirely legitimate reason for declining to discipline Feiner and resorting to other methods of remedying the situation.

As a matter of policy, it makes no sense to tell employers that they act at their legal peril if they fail to impose discipline even if they do not find what they

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[14](...continued)
A. It's not a matter of believe. It's a matter of you have no eyewitnesses. That's what you had there. You had one against one.

. . . .

Q. So you believed [Feiner's] denial more than you believed [Swenson's] recitation of events; is that correct?

A. No. What it is in these types of investigations I have to look and see whether or not there's going to be just cause to take the action against the person, and there was not just cause.

. . . .

Q. If you believed [Swenson], why did you need someone to back her up?

A. Because of the agreement between the Postal Service and the organization. Okay? You can't discipline an employee without just cause. It's just that simple.

consider to be sufficient evidence of harassment. See Harris, 132 F.3d at 984 ("We are mindful of the difficulty employers face when dealing with claims of harassment, finding themselves between the rock of an inadequate response under Title VII and the hard place of potential tort liability for wrongful discharge of the alleged harasser."); Stuck in the Middle: Employers Can Face Lawsuits from Accused as Well as Accusers, 69 U.S.L.W. 2539 (Mar. 13, 2001). Employees are no better served by a wrongful determination that harassment occurred than by a wrongful determination that no harassment occurred. We should be wary of tempting employers to conduct investigations that are less than fully objective and fair. Title VII "in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser." Harris, 132 F.3d at 984.

The dissent makes much of supposed defects in the Postal Service's investigation. While we believe that the investigation was competent,[15] it ultimately

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[15] Swenson has never alleged that the investigation here was an effort to whitewash Feiner, or that it was designed to reach a predetermined result. As the dissent concedes, Dissent at 25, all of the incidents of which Swenson complained involved only herself and Feiner—no other employee witnessed them, cf. Fuller, 47 F.3d at 1526, 1529, Hathaway, 132 F.3d at 1218; there was no physical proof, such as love notes or phone records, cf. Ellison, 924 F.2d at 874, Fuller, 47 F.3d at 1529; so far as the record reveals, Feiner had an unblemished disciplinary record. Cf. Star v. West, 237 F.3d 1036, 1038 n.1 (9th Cir. 2001) ("Defense counsel conceded, in his opening statement, that [the harasser's] disciplinary record was indefensible.").

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doesn't matter. In considering whether the employer's response was appropriate, we consider the overall picture. Even assuming that the investigation was less than perfect, the Postal Service nevertheless took prompt action to remedy the situation. The harassment stopped. The only possible consequence of a better investigation could have been to make out a stronger case for disciplining Feiner. But the purpose of Title VII is remedial—avoiding and preventing discrimination—rather than punitive. Gregory v. Litton Sys., Inc., 472 F.2d 631, 632 (9th Cir. 1973). Failure to punish the accused harasser only matters if it casts doubt on the employer's commitment to maintaining a harassment-free workplace. Where an employee is not punished even though there is strong evidence that he is guilty of harassment, such failure can embolden him to continue the misconduct and

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[15](...continued)

By contrast, the investigation in Fuller was a cruel farce. The investigator "often accepted Romero's [the accused harasser's] version [of disputed incidents] without taking reasonable and easy steps to corroborate that version," 47 F.3d at 1529; "failed to interview . . . a percipient witness favorable to plaintiff"; and "warned [Romero] of the claims against him so that he could prepare extensive documentation in his defense," id. Even after Romero admitted to some of the misconduct and to lying about it, the investigator "failed to corroborate Romero's . . . explanation" of a different alleged incident of harassment. Id. at 1526, 1529. Similarly, in Hathaway v. Runyon, 132 F.3d 1214 (8th Cir. 1997), the investigation was commenced only after repeated complaints, id. at 1218-19, and then was closed without consulting Hathaway and without interviewing an employee who had observed an egregious instance of sexual misconduct, id. at 1219, 1224. Nothing of the sort happened here.

encourage others to misbehave. But where the proof of harassment is weak and disputed, as it was in this case, the employer need not take formal disciplinary action simply to prove that it is serious about stopping sexual harassment in the workplace.[16] Where, as here, the employer takes prompt steps to stop the harassment, liability cannot be premised on perceived inadequacies in the

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[16] There seems to be some tension among our cases as to whether an employer must discipline the harasser if it determines that harassment has in fact taken place. Ellison is ambiguous on this point, 924 F.2d at 882, while two judges in Intlekofer v. Turnage, 973 F.2d 773 (9th Cir. 1992), stated that adequate remedial action could be taken without disciplining the harasser, at least as a first response. Id. at 781-83 (Keep, J., concurring); id. at 786 (Wiggins, J., dissenting). Yamaguchi v. U.S. Dep't of the Air Force, 109 F.3d 1475 (9th Cir. 1997), on the other hand, seems to suggest that remedial measures "must include some form of disciplinary action," id. at 1482; see also id. at 1483 ("an employer must take at least some form of disciplinary action against a harassing co-worker"); id. ("the employer's actions must both end the current harassment and discipline the offender"). Star v. West harmonizes these cases by explaining that, even when it finds that harassment has taken place, the employer may satisfy its remedial obligation by actions far short of formal discipline: "The discussion in the cited cases makes clear that counseling or admonishing the offender can constitute an adequate 'disciplinary' response." Star v. West, 237 F.3d 1036, 1039 (9th Cir. 2001).

According to this standard, the Postal Service here did in fact discipline Feiner by advising him that his conduct amounts to sexual harassment and twice admonishing him to stay away from Swenson. Plaintiff's—and the dissent's—argument that this was not discipline because the employer did not consider it such, see Dissent at 30, is contrary to what we said in Star: "An employer's refusal to apply the label 'discipline' to any of these actions is not determinative of their adequacy as a remedy. What is important is whether the employer's actions, however labeled, are adequate to remedy the situation." Star, 237 F.3d at 1039.

investigation.

The dissent also argues that the Postal Service should have accepted the findings of the EEOC administrative judge that it had violated Title VII. See, e.g., Dissent at 29-30. But the administrative judge based her conclusion on a finding that the employer had been put on notice by Rom that Feiner was harassing Swenson in August or September of 1993,[17] and rejected the Postal Service's position that it did not learn of the harassment until January 24, 1994. The jury, of course, agreed with the Postal Service as to when it received notice. See p. 10 supra. Had the jury agreed with Swenson and the administrative judge that the Postal Service had been on notice for five months before it even opened an

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[17] The administrative judge stated:

> However, Swenson's coworker Christopher Rom testified that he informed supervisor Ruben Domingo that Feiner was bothering Swenson only three or four weeks after Swenson came into the unit in August of 1993. Rom testified that Domingo said, "Maybe I'll talk to him." Rom testified that there was no cessation in Feiner bothering Swenson. (Testimony of Rom.)
>
> Domingo denies having been told of Feiner harassing Swenson. (Testimony of Domingo). I found Rom to be a credible witness. His testimony was forthright and consistent. . . . I conclude that the agency was put on notice of Feiner's unacceptable behavior approximately three or four weeks after Swenson came into the unit.

The jury plainly did not accord Rom the same credence as did the administrative judge.

investigation, we would surely reach a different conclusion. As we have made clear, our determination that the Postal Service took appropriate, prompt corrective action hinges on the jury's finding that the Postal Service was put on notice in late January 1994. Having found against Swenson on this crucial—and hotly contested—point,[18] the jury's conclusion that the employer's response subsequent to that date was not prompt and adequate was left without support in the record.

REVERSED.

[18] In her closing argument, plaintiff's counsel twice urged the jury to find, based on Rom's testimony, that the Postal Service was put on notice in August or September of 1993. Obviously, the jury was not persuaded.

Counsel

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